



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Jacques du Plessis, The South African Law of Unjustified Enrichment

Citation for published version:

Carr, D 2013, 'Jacques du Plessis, *The South African Law of Unjustified Enrichment*, *Edinburgh Law Review*, vol. 17, no. 1, pp. 102-04. <https://doi.org/10.3366/elr.2013.0143>

Digital Object Identifier (DOI):

[10.3366/elr.2013.0143](https://doi.org/10.3366/elr.2013.0143)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

Edinburgh Law Review

Publisher Rights Statement:

©Carr, D. (2013). Jacques du Plessis, The South African Law of Unjustified Enrichment. *Edinburgh Law Review*, 17(1), 102-04doi: 10.3366/elr.2013.0143

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



and patches” (4), which is personality. Throughout, Reid writes clearly, in an entertaining and engaging manner and with scholarly erudition. The book is a valuable reminder of the important and broad contribution which Scots law makes to this evolving field.

Abbe E L Brown
University of Aberdeen

EdinLR Vol 17 pp 102-104
DOI: 10.3366/elr.2013.0143

Jacques du Plessis, THE SOUTH AFRICAN LAW OF UNJUSTIFIED ENRICHMENT
Claremont: Juta (www.jutalaw.co.za), 2012. xliv + 436 pp. ISBN 9780702194740. R550.

It sometimes feels like the recognition of a South African general enrichment action has been imminent for years. In fairness, the indications have been that such a judicial recognition was, indeed, imminent. Law, however, has a stubborn tendency not to respect predictions: there is still no judicially sanctioned “general enrichment action” in South Africa. Yet, at least, as du Plessis explains, the judiciary have accepted the *idea* of a general action. Full recognition seems tantalisingly close. Therefore, the challenge for South African text writers has been to explain not only the characteristics of any emerging general action – which this text does in an astonishingly accessible way; they have also had to identify how any such action might fit into the existing legal landscape. That challenge dovetails with the broader, and admittedly more venerable, need to make doctrinal space for the relatively recent development of enrichment law as an independent discipline.

Scottish lawyers have much to gain from works like these, and not only because of a juridical camaraderie flowing from being “mixed” legal systems at a general level. Affinities between the two systems’ enrichment laws, and theorists, run deep. This text is a welcome adornment to that comity. Furthermore, the relatively recent revamp of Scottish unjust(ified) enrichment law, that culminated in Lord Rodger’s decision in *Shilliday v Smith* 1998 SC 725, has bestowed a strikingly similar legacy: something that looks akin to a general enrichment action, but which is, probably, not quite the real thing. That, at least, was the view advanced by Lord Rodger, who was well placed to make the observation, writing extra-judicially in 2002. A Scottish lawyer, and almost certainly lawyers from other jurisdictions, consulting this book will have reason to be impressed and grateful in equal measure.

Du Plessis’s early discussion of the taxonomical implications of a general action, and the different choices of perspective that the recognition of such an action would offer, is remarkable for its clarity, and it frames the entire text admirably. Three conceptualisations are available to frame the general action as it has developed so far. These contrast with the “traditional approach”, which now seems passé, whereby the existence of a general action is dismissed out of hand. The first option is to consider the general enrichment action to be subsidiary and residual. A similar view might be taken of the use of the *nemo debet locupletari ex aliena jactura* maxim in Scotland as a normative reservoir, as noted by Niall Whitty, but not one that can be directly tapped. In effect the rules and requirements that underpin existing actions that are grouped as “enrichment actions” endure untouched – the general action is residual in that it appears only when facts emerge outside existing categories. Not only are the existing categories untouched, they are accorded primacy over requirements that may emerge from the general action – hence the subsidiary label. This view of the general enrichment action, which appears to be that of the courts, accords primary importance to continuity and perceived stability. However, as du Plessis notes, such a view has the potential for bijuralism. A two-track law of enrichment could emerge, causing instability. The second option

is to raise the general action to an all encompassing and exclusive status—any enrichment action would rest upon the general action. Such an approach is perhaps superficially more attractive, but entails replacing all that has gone before. To a Scottish lawyer such an approach brings to mind David Sellar's observations about how the apparently straightforward *Shilliday* decision might, on one view, be seen to be doing violence to discretely developed actions. "So be it", as Sellar himself recognised, might be the refrain—sometimes eggs are broken making an omelette. But judges can be reticent about departing from tried and tested recipes—whether it be because they are worried about exactly what dish will emerge, or they doubt their authority as the law's sous chefs to make such a departure without express authorisation from the legislature. Du Plessis shrewdly observes that previous attempts to make a clean break have, in any event, normally ended with the recipe book being hurriedly retrieved from the bin. Therefore, the third option is to fuse the general action with the existing actions in a manner that retains a demarcated space between the two, but at the same time interlinks them in a mutually reinforcing way. That is achieved by having the general action as an almost ephemeral overarching rule, which can be observed manifest in the existing actions. Scots lawyers familiar with developments here will recognise this narrative as remarkably similar to the formidable rebranding exercise that can be observed in both Lord Rodger's judgment in *Shilliday* itself, and in the subsequent rationalisation of that judgment by Niall Whitty, Daniel Visser, and by du Plessis himself in previous work. Therefore, the Scottish enrichment lawyer using this book is immediately at home and attuned to the tenor of the text. Those who are not intimately acquainted with high taxonomical theory will benefit from the concision of du Plessis's exposition of these conceptualisations at the theoretical level and, perhaps more importantly, how these different understandings and their implications define the substantive content of the operative rules within enrichment law.

Important, and impressive, as the taxonomical explanations are for framing the text in a Scottish context, the analyses of the particular constituents of enrichment law are profound. Indeed, to say that the author's learning is worn lightly would be clumsy for it is both substantial and obvious. Only a flavour of it can be addressed here. Crucially, the overwhelming characteristic of the whole text is the clarity it applies to difficult conceptual ideas. Deploying the dominant civilian approach to dividing the study of enrichment law according to the mode of a benefit's conferral, that is to say by "transfer", traditionally represented by the *condictiones*, "imposition", and "taking", is not surprising; but the quality of the explanation is exceptional. The discussion of enrichment by transfer would repay study for a Scottish lawyer, though perhaps not as much as the discussion of enrichment by imposition: simply because Scottish lawyers already have a discussion of enrichment by transfer, with Robin Evans-Jones's excellent *Unjustified Enrichment, Enrichment by Deliberate Conferral: Condictio*, that deals with the *condictiones* in a way that is necessarily more calibrated to Scottish law. A monograph treatment of enrichment by imposition or taking is, however, lacking in Scotland—for the moment at least. Of particular interest to a Scottish lawyer might be the discussion, in chapter 8, of imposed enrichment and the "extended" or "impure" *gestio*—the *actio negotiorum gestorum utilis*. It is open to question whether this action has been received into Scottish law: if it has—and it remains a useful construct—this discussion will be extremely useful. Likewise, the discussion, in chapter 11, of the interface between proprietary and enrichment in the context of enrichment by taking can be readily transposed to the Scottish context.

There are different points of departure from those in Scottish law as well, such as how the particular historical context of South Africa provides an opportunity to reflect upon the potential for enrichment as a vehicle for reversing inequities of the past. The same might have been said about the discussion of the omnipresence of the South African Constitution

in doctrinal private law, but the emergence of a nascent human rights discourse in this country means that this difference might not be as pronounced as it might once have been.

This text will be incredibly useful for academics and students engaged in advanced undergraduate or postgraduate study—whether they are seeking guidance on Scottish law, or for comparative study. Practitioners would also find the text useful for explaining elements of enrichment law in Scotland, aided by the various references to Scottish law throughout the text. Furthermore, the text could prove invaluable for those seeking to fill gaps in the existing Scottish literature.

Daniel J Carr
University of Edinburgh

EdinLR Vol 17 pp 104-106
DOI: 10.3366/elr.2013.0144

THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW. Eds Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann with Andreas Stier

Oxford: Oxford University Press (www.oup.com), 2012. 2 Vols; Vol 1, xxxviii + 977 pp.; Vol 2, xxxiv + 970 pp. ISBN 978019957895. £350.

The handsomely presented books which comprise this two volume set as published by Oxford University Press are an updated, expanded and more internationally focussed English language version of the excellent *Handwörterbuch des Europäischen Privatrechts* (published by Mohr Siebeck in 2009, edited by Basedow, Hopt, Zimmermann with Illmer). As the title suggests, the text is concerned with European private law and has been prepared by the Hamburg branch of the Max Planck Institute with assistance and additional contributions from equally distinguished legal academics from elsewhere in Germany, greater Europe and also the United States.

Volume 1 begins with “Abuse of a Dominant Position” and ends with “Interpretation of Contracts”. Volume 2 begins with an entry concerning the “Interpretation of EU Law” and closes with an entry upon the World Intellectual Property Organisation. The encyclopaedia presents the reader with roughly 500 alphabetically arranged and cross-referenced entries which each feature explanation and definition of the subject of the entry, an account of the main academic opinions and (where present) mention of the academic and jurisprudential controversies relating thereunto plus multi-lingual references to legal sources and also to further multi-lingual readings. The entries, which happily are all alphabetically listed at the front of each volume, are often fragmented along thematic lines so that a large subject (such as Competition Law or Intellectual Property) can be better tackled by the relevant specialist authors and also may better present the enquiring reader with detail upon the relevant aspect of the enquiry at issue. The reader searching for “competition law” is presented with seven discrete and successive entries under that specific name: Competition (Internal Market); Competition Law (International); Competition Law (Private Enforcement); Competition Law (Procedure); Competition Law (Relationship between European and National Law); Competition Law (Sanctions); Competition Rules (Applicability).

The level of detail presented in each entry is most impressive given the necessary space constraints. Each entry amounts to a brief scholarly article upon the particular subject of the entry and typically covers several double column 56 line pages of carefully expressed academic comment in what looks to be 10 point type: the crude average is a little less than four pages per entry but naturally variations abound. The seven entries noted above concerning “Competition Law” occupy twenty nine pages but this is by no means the end of the story as they are